

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRANK INDICK AND F. & R. SALES	:	DETERMINATION
	:	DTA NO. 818846
for Revision of Determinations or for Refund of Cigarette	:	
Tax under Article 20 of the Tax Law for the Period Ended	:	
March 15, 2001.	:	

Petitioners, Frank Indick and F. & R. Sales, 1615 Spring Street, Syracuse, New York 13208, jointly filed a petition for revision of determinations or for refund of cigarette tax under Article 20 of the Tax Law for the period ended March 15, 2001.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York on June 19, 2002 at 10:30 A.M. Petitioners appeared by John Blasi. The Division of Taxation appeared by Barbara G. Billet, Esq. (Paula Tunkel).

Since neither party herein elected to reserve time for the submission of post-hearing briefs, the three-month period for the issuance of this determination commenced as of the date the small claims hearing was held.

ISSUES

I. Whether petitioner Frank Indick was a person in possession of or had control of 91.3 cartons of unstamped or unlawfully stamped cigarettes and, as such, is liable for a penalty in the sum of \$12,900.00 imposed pursuant to Tax Law § 481(1)(b)(i).

II. Whether the Division of Taxation properly determined that petitioner F. & R. Sales is a retail dealer of cigarettes who failed to obtain a certificate of registration and, as such, is liable for a penalty of \$2,000.00 imposed pursuant to Tax Law § 480-a(3)(a).

FINDINGS OF FACT

1. Petitioner F. & R. Sales operates a small variety store selling miscellaneous new and used items, such as ethnic clothing, from a store located at 472 North Salina Street, Syracuse, New York. F. & R. Sales also sells its goods at various flea markets and other open air venues. Petitioner Frank Indick is the owner of F. & R. Sales, operating the business as a sole proprietor.

2. On March 9, 2001, an employee at the Division of Taxation's ("Division") Syracuse office received an anonymous telephone call stating that F. & R. Sales was selling unstamped cigarettes. On March 15, 2001, two investigators from the Division's Syracuse office conducted a retail investigation/inspection of F. & R. Sales. The investigation/inspection began when petitioner Frank Indick arrived at the store and parked his van by the store. Upon approaching the van the Division's investigators observed a substantial number of cartons of cigarettes in the passenger seat area of the van. The investigators found a total of 52.8 cartons of cigarettes in the passenger seat area of the van and all of these cigarettes were unstamped. The unstamped cigarettes were promptly seized.

3. In addition to seizing the 52.8 cartons of unstamped cigarettes, the investigators also seized the van. Since the back of the van was completely filled with merchandise, it was necessary to unload all of the merchandise into the store. In the course of unloading the van the investigators discovered an additional 33.8 cartons of unstamped cigarettes which were also seized. While in the store, the investigators found 4.7 cartons of unstamped cigarettes on a table behind the sales counter. A subsequent review of the Division's computer records revealed that F.& R. Sales did not possess a Certificate of Registration as a retail dealer of cigarettes as of March 15, 2001.

4. Petitioner Frank Indick was issued two appearance tickets charging him with misdemeanor criminal violations of Tax Law § 1814 for attempting to evade or defeat the tax imposed by Article 20 and for possession of unstamped cigarettes. On June 12, 2001, the two

misdemeanor charges were adjourned in contemplation of dismissal by Syracuse City Court and on December 12, 2001 the charges were dismissed.

5. On July 13, 2001, the Division issued a Notice of Determination to petitioner F. & R. Sales asserting that a penalty of \$2,000.00 was due since “you were found to be in violation for failure to possess a valid New York State certificate of registration for retail sales of cigarettes.” The penalty was imposed pursuant to Tax Law § 480-a(3)(a) in the maximum amount of \$2,000.00.

6. On August 31, 2001, the Division issued a second Notice of Determination, this one addressed to petitioner Frank Indick, asserting that he was liable for a penalty in the sum of \$12,900.00. The penalty was imposed pursuant to Tax Law § 481(1)(b)(i) at the maximum rate of \$150.00 per carton for 86 cartons of unstamped cigarettes. Although 91.3 cartons of unstamped cigarettes were found, Tax Law § 481(1)(b)(i) provides that the penalty of \$150.00 per carton be imposed for every carton in excess of five cartons of unstamped or unlawfully stamped cigarettes. Petitioners jointly filed a petition contesting both notices of determination and this proceeding ensued.

7. Petitioner Frank Indick began operating F. & R. Sales on a part-time basis in the early 1980s. In October 1994 Mr. Indick retired from his full-time job as a tool and dye maker, an occupation he engaged in for some 35 years. After his retirement Mr. Indick devoted all of his time to F. & R. Sales.

8. The unstamped cigarettes found in Mr. Indick’s van were purchased by Mr. Indick at the Tuscarora Indian Reservation located in Lewiston, New York. It was Mr. Indick’s practice to travel to the Tuscarora Indian Reservation to purchase cigarettes for his family, specifically for his spouse, son and son-in-law, and also as an agent for numerous friends. Mr. Indick traveled to the Tuscarora Indian Reservation to purchase cigarettes because the prices there were substantially lower than those charged at the Indian reservation located closer to the Syracuse, New York area. Mr. Indick did not generate a profit from the cigarettes he purchased at the

Tuscarora Indian Reservation as said cigarettes were either consumed by family members or transferred at cost to friends.

9. Mr. Indick was properly registered as a vendor with the Division for sales and use tax purposes and he has always met his personal income tax and sales and use tax liabilities in a timely manner. Mr. Indick believed that he did not have to register as a retail dealer of cigarettes pursuant to Article 20 of the Tax Law since he did not sell cigarettes at retail but simply bought them as a favor for family and friends for personal consumption. The 4.7 cartons of unstamped cigarettes found by the Division's investigators behind the sales counter at the variety shop were not for sale to the general public but instead were placed there for the personal consumption of family members who might be working at the store. A follow-up visit to the variety shop by one of the Division's investigators revealed that no cigarettes were being displayed or offered for sale to the general public at this location.

CONCLUSIONS OF LAW

A. I will first address the assessment issued to petitioner Frank Indick in the sum of \$12,900.00 for his alleged possession or control of 91.3 cartons of unstamped cigarettes. Tax Law § 481(1)(b)(i) provides, in pertinent part, that "the commissioner may impose a penalty of not more than one hundred fifty dollars for each two hundred cigarettes, or fraction thereof, in excess of one thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person. . . ." The penalty imposed by Tax Law § 481(1)(b)(i) can be waived in whole or in part by the commissioner in the commissioner's discretion (Tax Law § 481[1][b][iii]).

B. In the instant matter it is clear that petitioner Frank Indick was a person in possession or control of the 91.3 cartons of unstamped cigarettes found in his van. There is no dispute that Mr. Indick purchased these unstamped cigarettes at the Tuscarora Indian Reservation and thereafter personally transported said unstamped cigarettes to the Syracuse, New York area.

Accordingly, it was proper for the Division to assert that Mr. Indick was liable for the penalty imposed by Tax Law § 481(1)(b)(i).

C. Although I have concluded that the Division properly assessed a penalty against Mr. Indick, I believe that under the circumstances presented herein it is just and equitable (Tax Law § 2012) to reduce the penalty from \$12,900.00 to \$1,500.00. Mr. Indick did not purchase the 91.3 cartons of unstamped cigarettes with the intent to resell them at a profit but instead purchased them as a favor for the personal consumption of family members and friends. Mr. Indick cooperated fully with the Division's investigators and it must also be noted that all the criminal charges were subsequently dismissed. Moreover, Mr. Indick has consistently met his personal income tax and sales and use tax obligations in a timely manner, thus establishing a pattern of generally complying with the requirements of the Tax Law.

I arrived at a reduced penalty figure of \$1,500.00 taking into consideration Tax Law § 481(2)(a) which provides that "the possession within this state of more than four hundred cigarettes in unstamped or unlawfully stamped packages . . . by any person other than an agent or distributor, as the case may be, at any one time shall be presumptive evidence that such cigarettes . . . are subject to tax as provided by this article." Tax Law § 471-a imposes a use tax on cigarettes on any person who uses (i.e., possesses, stores, retains, imports, etc.) untaxed cigarettes in this state. Said section further requires that a person in possession of untaxed cigarettes must file a use tax return (Form CG-15) "within twenty-four hours after liability for the tax accrues . . . together with a remittance of the tax shown to be due thereon." In the instant matter, petitioner Frank Indick was in possession of a total of 913 packs of untaxed cigarettes and the cigarette tax due on said 913 packs, using the \$1.11 tax rate per pack in effect on March 15, 2001, would total \$1,013.43. I believe that reducing the penalty to \$1,500.00 represents a reasonable amount given the fact that Mr. Indick would owe at least \$1,013.43 in tax, plus interest.

D. Turning next to the \$2,000.00 penalty assessment issued to petitioner F.& R. Sales for failure to register as a retail dealer of cigarettes, I am convinced that the 4.7 cartons of unstamped cigarettes found in the store were for personal consumption and were not being offered for sale to the public. Accordingly, petitioner F. & R. Sales was not engaged in the retail sale of cigarettes to the public, was not required to register with the Division as a retail dealer of cigarettes and is not subject to the \$2,000.00 penalty imposed pursuant to Tax Law § 480-a(3)(a) for the failure to obtain a certificate of registration.

E. The petition of Frank Indick is granted to the extent provided in Conclusion of Law "C"; the Division is directed to modify its Notice of Determination dated August 31, 2001 so as to be consistent with this determination; and, except as so granted, the petition as it relates to Frank Indick is in all other respects denied.

The petition of F. & R. Sales is granted and the Division's Notice of Determination dated July 13, 2001 is hereby canceled in its entirety.

DATED: Troy, New York
September 12, 2002

/s/ James Hoefer
PRESIDING OFFICER